



December 6, 2000

Mr. Kenneth Stewart
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2000-4617

Dear Mr. Stewart:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 141892.

The Texas Department of Transportation (the "department") received a request for the preliminary set of plans for the new Kell Extension. You do not claim that the requested information falls under an exception to required disclosure under Chapter 552 of the Government Code. Instead, you claim that because the department owns a copyright to the requested information, the department is entitled to protect the information from being copied. We have considered the argument you raise and reviewed the submitted information.

As a preliminary matter, we note that although the department discusses section 552.104 of the Government Code, it does not appear that the department is actually raising this exception in regard to the requested information. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. The department does not argue that it is involved in any kind of commercial transaction or bidding process involving the requested information. Instead, the department states that while it does not object to the requestor viewing the documents at issue, it "has concerns about possible negative impacts on the competitive bidding process in allowing copies of these interim plans to be circulated. . . . This very concern is the basis for the exemption from disclosure found at 552.104. Because TxDOT refuses to prohibit all access to these copyrighted documents, this section is unavailable as a basis for withholding copies." Therefore, the department is apparently not raising section 552.104, but simply discussing it to illustrate the department's concern for allowing the requestor to copy the requested information, rather than simply review the information.

In Open Records Decision No. 660 (1999), this office analyzed the effect of a copyright held by a governmental body on the governmental body's obligation to otherwise release the copyrighted information under the Public Information Act.

The Federal Copyright Act (the "FCA"), title 17 of the United States Code, gives copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) . . . [cites omitted]. The FCA gives copyright owners the exclusive right to control the use of copyrighted works. *See* 17 U.S.C. § 106. This right is subject to exceptions, the most important of which may be the "fair use" of the works. *See id.* § 107.

The FCA does not make information confidential, but rather gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. *See id.* §§ 106, 107. . . . We believe that any use must be consistent with federal copyright law. *See id.* §§ 101 *et seq.*; Attorney General Opinion JM-672 at 2-3 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records owned by third parties).

Open Records Decision No. 660 at 4 (1999).

You explain that the department, and not a third party, holds the copyright to the requested information. *See* Transp. Code § 201.205. Accordingly, consistent with copyright law, the department must at least allow the requestor access to the information. *See id.* However, the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 9 (1990). Moreover, the Public Information Act does not prohibit a governmental body from protecting its copyright by entering into licensing or use agreements, or exercising its rights under the FCA. ORD 660 (citing Minn. Op. Atty. Gen. 852, 1995 WL 775042 (state agencies may place reasonable restrictions on use of their "original works of authorship" consistent with rights of copyright owner under FCA)); Miss. Op. Atty. Gen. (May 23, 1991), 1991 WL 577834 ("main purpose in copyrighting is to require anyone reproducing the maps and data for commercial purposes to disclose the source of data"). Therefore, while the department must allow the requestor to have access to the submitted information under the Public Information Act, it may place reasonable restrictions on the use of the information consistent with the rights of a copyright owner under the FCA. *See* ORD 440.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

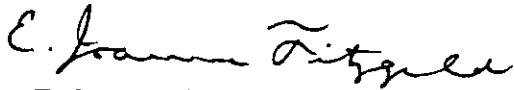
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Joanna Fitzgerald". The signature is fluid and cursive, with the first name "E." and last name "Fitzgerald" clearly distinguishable.

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 141892

Encl: Submitted documents

cc: Mr. John Shine
Project Manager
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(w/o enclosures)